P. Senthil Kumar Vs R. Sunitha

Court: Madras High Court

Date of Decision: Nov. 30, 2010

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 141
Constitution of India, 1950 â€" Article 226
Criminal Procedure Code, 1973 (CrPC) â€" Section 125
Evidence Act, 1872 â€" Section 56
Guardians and Wards Act, 1890 â€" Section 7
Hindu Minority and Guardianship Act, 1956 â€" Section 6
Penal Code, 1860 (IPC) â€" Section 498A

Hon'ble Judges: S. Manikumar, J

Bench: Single Bench

Advocate: G. Rajan, for the Appellant; R. Shanmugasundaran, SC for Saravanan, for the Respondent

Final Decision: Dismissed

Judgement

S. Manikumar, J.
This appeal is directed against the order and decree made in GWOP. No. 534 of 2004, dated 23.12.2004 on the file of

the Family Court, Coimbatore.

2. For the sake of convenience, the parties are referred to as the Petitioner and Respondent.

3. Facts leading to the appeal are as follows:

Marriage between the parties was solemnized on 29.04.1994, as per the Hindu Rites and Customs and it was registered in the Office of the

Registrar, Erode. Out of the wedlock, a male child was born. At that time, the Petitioner was the owner of Oil Tanker lorries and doing business in

the Coimbatore. Due to strained relationship, the Respondent left the matrimonial home and filed M.C. No. 245 of 2001 for maintenance in the

Family Court, Chennai. The application was dismissed for default, since the Respondent did not attend the Court. Thereafter, the Respondent filed

a Divorce Petition before the Family Court, Coimbatore, with false and untenable allegations. The petition was resisted. During the course of

litigation, though the Petitioner repeatedly demanded for the custody of the child, but the Respondent refused to hand over the child. According to

him, the Respondent was living with her parents separately and that the minor child was a hosteller in Ooty, without any love and care.

4. It is the further contention of the Petitioner that though he had made several attempts to see the minor child, all his attempts were in vain and that

he was not even permitted to see his child in the hostel. As the Respondent has not provided due care and attention to the child and not brought

him in good atmosphere and considering the welfare of the child, he was constrained to file a petition under the Guardian Wards Act, for custody.

The Petitioner has further submitted that he is ready and willing to give all his attention, love and affection to the child, education in a good school

and provide all the best, for the welfare of the child.

5. Mother of the child, resisted the petition, contending inter alia that the Petitioner has no interest for the welfare of the child and that he has not

even mentioned the date of birth of the child in the petition. She further submitted that she was ill-treated and harassed at the hands of the Petitioner

and therefore, she was forced to leave the matrimonial home. According to her, the child is given the best of education and as a mother, she has

put in all her efforts, to provide everything that the child requires. She has denied the contention that as a hosteller, the child has lost the love and

affection. She further contended that when the Petitioner has refused to provide even reasonable maintenance to herself and the child, she was

constrained to prefer M.C. No. 245 of 2001 on the file of the Family Court, Chennai, but at that time, she was studying her Secretarial Course

and subsequently, shifted to Ooty. In the said circumstances, she could not appear before the Family Court and consequently, the petition ended in

dismissal for non-appearance. It is her contention that the Petitioner had not shown any love and affection to her or to the minor son and for the

above said reasons, sought for dismissal of the Guardian Petition.

6. Before the Family Court, Chennai, in addition to the Petitioner, Mr. Senthil Kumar and Mr. Palaniappan, were examined as Pws.1 and 2

respectively. Affidavit and counter affidavit in O.P. No. 152 of 2001, filed for divorce by the Respondent, were marked on the side of the

Appellant. The Respondent examined herself as RW.1 and marked the reply affidavit of the Appellant in the said O.P. On evaluation of the

pleadings and evidence, the Family Court, Coimbatore, found that the Petitioner has not made out a case for grant of Guardianship and considering

the paramount welfare and interest of the minor child and the conduct of the parties, towards the welfare of the child, found that retention of

custody and guardianship with the mother would be best suited for the child and accordingly, dismissed the guardianship petition. The Family Court

further observed that the petition does not even attract or satisfy the requirements of the provisions of Guardian and Wards Act and Hindu

Minority and Guardianship Act. The Family Court also observed that when the Petitioner had even doubted the paternity of the minor son, in the

proceedings instituted for divorce, the request of the Petitioner, seeking for custody of the child, is not genuine.

7. In these factual background, referring to Section 25 of the Guardian and Wards Act (8 of 1890) (hereinafter referred to as ""the Act""), learned

Counsel for the Petitioner submitted that there is no statutory requirement under the said provision that the child should have been removed from

the custody of the natural guardian for maintaining a petition under the Act and what is required to be considered is only the paramount welfare and

interest of the child. He further submitted that in order to maintain a petition u/s 25 of the Act, it is immaterial as to whether the minor child left the

custody of the guardian on his own accord or removed from him.

8. Learned Counsel for the Appellant further submitted that when the father is the natural guardian u/s 6 of the Hindu Minority and Guardianship

Act, (32 of 1956), the rejection of the petition on the ground that the Petitioner did not satisfy the requirements of Section 25 of the Act, is

erroneous and therefore, the lower Court has misdirected itself with reference to the statutory provisions of the Act. He also submitted that when

an application has been filed u/s 25 of the Act, it is incumbent on the Court to consider only the welfare of the child and non-suiting the Petitioner

for the above said reasons, is erroneous.

9. Taking this Court through the impugned order, learned Counsel for the Appellant submitted that the observations of the lower Court that when

the Appellant had doubted the chastity of his life and paternity of the child and that it only reflects the conduct of the Petitioner and therefore, he is

not entitled to guardianship, is factually incorrect. It is his further contention that the Petitioner had never doubted the paternity of the child.

10. Though before the lower Court, there is no averment, alleging that the Respondent had solemnized a marriage, prior to contracting a marriage

with the Petitioner, learned Counsel for the Petitioner attempted to rely on a xerox copy of a document, before this Court, not marked before the

lower Court and further submitted that even before the Petitioner solemnized the marriage with the Petitioner, she was already married to

somebody and after the decree of divorce granted in HMOP. No. 152 of 2001, the Respondent had contracted another marriage. He therefore

submitted that the Respondent, who had willfully and intentionally suppressed the earlier marriage and contracted another marriage after the decree

of divorce, is not entitled to guardianship and custody of the minor child.

11. Inviting the attention of this Court to the absence of any specific denial in the counter affidavit filed by the Respondent, learned Counsel for the

Petitioner submitted that the above said averment touching upon the suppression and the conduct of the Respondent, is implicitly admitted and

therefore, the lower Court ought not to have allowed the custody of the child to be retained with such a person and should have considered the

paramount welfare of the child, who is now forced to live in such atmosphere.

12. Learned Counsel for the Petitioner further submitted that the paternity of the Respondent was never questioned in the Guardian Petition and

even assuming that the said issue was considered earlier, while adjudicating the right of the Respondent to seek for divorce in HMOP on the file of

the Family Court, Chennai, any finding recorded adverse to the Petitioner should be confined only to the said proceedings and it cannot be

considered in a petition filed for guardianship. He further submitted that even assuming that the alleged conduct of questioning the paternity was one

of the basis for arriving at the conclusion that there was cruelty, leading to an order of divorce, the said aspect should not be taken as a material

factor in deciding the inter se rights of the parties, in an application for Guardianship, when the paramount welfare of the child is the sole criterion.

13. On the finding of the lower Court that the Appellant had not taken sufficient care and attention of the minor child and that he has not spent any

money in buying clothes and incurred expenditure, learned Counsel for the Petitioner submitted that the Petitioner is a businessman in Coimbatore,

owing an Oil Tanker lorry and normally, when any expenditure is incurred for the maintenance of the family, providing education for the children,

etc., no husband who contributes a portion of the income towards routine expenditure, including education, food, shelter, etc., would maintain any

separate accounts. He therefore submitted that these aspects cannot be proved with any materials and in such circumstances, the finding rendered

by the lower Court that the Petitioner has not paid any amount for educating his minor son, is factually incorrect.

14. Learned Counsel for Petitioner further submitted that though he has attempted to see his child, both at the residence of the Respondent and in

the School, the Respondent has deliberately thwarted his sincere efforts and even the School authorities have refused to permit him to see the child.

Placing reliance on a decision of this Court reported in Mohan Kumar Rayana v. Komal Mohan Rayana reported in 2008 (3) MLJ 536 (SC), he

submitted that the Petitioner should not be denied access to the minor child and therefore, the deliberate and willful denial of visiting rights would

support the case of the Petitioner, that he has due regard for the welfare of the minor child and that the Respondent has only deprived of

Petitioner"s legitimate right.

15. Comparing the financial status of the parties and the dependency of the Respondent, even for her own maintenance, learned Counsel for the

Appellant submitted that better financial resources of either of the parents is certainly an important factor in determining the custody of the minor

child. He also submitted that between a short span of time, the child has been transferred to, not less than six schools and certainly frequent

dislocation would cause emotional strain and affect his education and talent. It is also his contention that sitting at Coimbatore and bringing up the

child in Hostel at Ooty, cannot be said to be extending love and affection and it would not inculcate the values of care and guidance required to be

provided to a minor child. In this context, he relied on decisions of this Court in Sharli Sunitha Vs. D. Balson, and J. Selvan v. N. Punidha reported

in 2007 (4) MLJ 967.

16. Learned Counsel for the Petitioner further submitted that when the Petitioner is willing to provide the child, all the needs that are required, to

have a better socio and economic support, the lower Court has misdirected itself, in approaching the statutory provision u/s 25 of the Guardian and

Wards Act and failed to consider the paramount welfare and interest of the child. He therefore submitted that when the whole approach to the

issue is both factually and legally untenable, the impugned order deserves to be set aside and consequently, prayed to declare the Petitioner, as the

guardian for the minor child.

17. Per contra, Mr. R. Shankmugasundaram, Learned Senior Counsel for the Respondent submitted that the marriage between the Petitioner and

the Respondent was solemnized on 29.04.1994 and that it was a love marriage, performed without the knowledge of their parents, but with their

blessings. Out of the wedlock, a male child was born on 06.01.1995 and that within a short span of time, the Respondent underwent tremendous

mental tension and physical torture. She was beaten black and blue in drunken condition by the Petitioner and unable to bear the physical and

mental creulty, she even attempted to strangulate herself. Unfortunately, the Respondent was admitted in a nearby hospital and in these

circumstances, she was forced to leave the matrimonial home and filed O.P. No. 152 of 2001 on the file of the Family Court, Coimbatore, for

divorce on the ground of cruelty.

18. Taking this Court through the judgment in H.M.O.P. No. 152 of 2001, dated 18.12.2003, learned Counsel for the Respondent further

submitted that the Appellant had even doubted the paternity of the minor child and alleged adulterous living with another person. He further

submitted that when the male child was born, the Respondent refused to accept the child, since the child was little dark in color.

19. Inviting the attention of this Court to the specific finding recorded by the lower Court with regard to mental and physical cruelty, including

suspicion of paternity of the child, Learned Senior Counsel for the Respondent submitted that when the Petitioner has not questioned the findings

recorded in the judgment recorded in the proceedings for divorce, in O.P. No. 152 of 2001 by the Family Court, Chennai, it is not open to the

Petitioner to project a case, as if, he was very much affectionate and interested in the welfare of the child.

20. Learned Senior Counsel further submitted that ever since the child was born on 06.01.1995, the Petitioner had never paid any attention either

to the mother or the minor son and when the Respondent filed M.C. No. 57 of 2003 on the file of the Family Court, Coimbatore, claiming

maintenance of Rs. 10,000/-each for herself and the minor son, the Petitioner filed a counter affidavit, denying his liability to pay maintenance and

ultimately, by order, dated 23.12.2004, the Family Court, Coimbatore, ordered the Appellant to pay maintenance.

21. Learned Senior Counsel further submitted that when the Petitioner''s strong opposition to discharge his moral and legal obligation to provide

maintenance was repelled by the Family Court, Coimbatore, by its order, dated 23.12.2004, directing the Petitioner to pay maintenance, it is not

open to the Petitioner to contend that he was always ready and willing to provide care and attention, extending financial support with love and

affection to the minor son.

22. Learned Senior Counsel further submitted that when the order in M.C. No. 57 of 2003, dated 23.12.2004, directing the Appellant to pay

maintenance was sought to be enforced, by claiming the arrears of maintenance amount of Rs. 4,54,833/-, the Petitioner filed Crl.R.C. No. 908 of

2005 before this Court in July'' 2005 to set aside the above said order. He further submitted that a conditional order to deposit the arrears of

maintenance was made by this Court on 06.12.2005 and thereafter, though the matter was referred to Lok Adalat for an amicable settlement, the

Petitioner was not willing for any settlement and consequently, the Criminal Revision Petition was sent back to this Court and upon hearing the

parties, this Court, by order, dated 09.11.2006, dismissed the revision petition, upholding the order of maintenance to the minor son and the

Respondent, till her remarriage on 17.04.2006. Thereafter, the Appellant filed SLP (Crl) No. 1131 of 2007 before the Supreme Court,

challenging the order, dated 09.11.2006 and obtained an order of stay of the maintenance decree on frivolous grounds.

23. Inviting the attention of this Court to the sequence of events from 1994 till 2008, Learned Senior Counsel further submitted that to thwart and

defeat the order made in M.C. No. 57 of 2003, the Petitioner has now taken out a false claim of guardianship under the Guardian and Wards Act.

He further submitted that from 1994 to 2008 onwards, the Petitioner has not made any attempt to see the child and that no application was also

filed for the said purpose. Now, for the first time, in the year 2008, the Petitioner has taken out an application under Guardian and Wards Act, as if

he is interested in the welfare of the child. According to him, the conduct of the Petitioner would clearly reflect his malafide intention to deny the

entitlement of the Respondent and her minor son, for maintenance.

24. Learned Senior Counsel for the Respondent submitted that when no specific averments were made in the guardianship petition and when no

supporting evidence, was let in both oral and documentary, it is not open to the Petitioner to make a false allegation against the Respondent that

she was already married, before contracting a marriage with him. He further submitted that the arguments of the Petitioner are liable to be rejected

in limini.

25. On the aspect of providing education, health, moral and social support, Learned Senior Counsel further submitted that the Respondent has

admitted her minor son, in a Convent School with high profile and better coaching in Ooty. Her parents, who are financially sound, have taken up

the responsibility of educating her son. All along the Petitioner had not spent even a single pie for the education of his minor son and even during

the short period of 10 days, where they lived together, as per the directions of this Court, he did not spend any money towards the education or

for any other requirements of the child and therefore, the attitude and conduct of the Petitioner is only to snatch away the custody of the child. He

further submitted that for the past 15 years, not even once, he has attempted to see the minor son and though the present appeal, is pending since

2008, he has not filed a petition for visitation rights.

26. Learned Senior Counsel for the Respondent submitted that though her parents insisted her to live them, she is living separately in a flat,

purchased by her father, which is just opposite to the School, where, the minor son is studying. He further submitted that when the minor son

underwent his education in a Convent School in Ooty, with good and quality education, he had never felt isolated, as more than 100 students were

staying in the Hostel. It is his further contention that the minor son has been provided with all his needs and that he has excelled in playing cricket

and swimming. He represents the District and the School in various disciplines of sports. In order to improvise his sports interest, she had to

accommodate him in different schools and that would not affect his education.

27. Learned Senior Counsel for the Respondent further submitted that the minor son has grown up and is also matured. On an earlier occasion, he

had appeared before this Court and expressed his clear intention to stay with his mother and in such circumstances, the attempt on the part of the

Petitioner to get the guardianship and custody of the minor child, would certainly cause mental strain, affecting his concentration in studies.

28. According to the Learned Senior Counsel for the Respondent, the Petitioner has gone to the extent of instituting criminal cases against the

parents of the Respondent and even for declaration of the marriage, dated 29.04.1994 between the parties, as null and void. In these

circumstances, the intention of the Petitioner is only to grab the minor son, from the Respondent and thwart the claim of maintenance, which is

upheld by this Court. According to him, the Court below has considered all the parameters that are necessary for adjudication the issue,

paramount welfare of the child, and rightly declined the guardianship, in favor of the Petitioner.

29. Learned Senior Counsel for the Respondent submitted that re-marriage of the Respondent per-se is no ground to disentitle the claim of the

Respondent for retention of guardianship. According to him, she got married on 17.03.2006 and that her re-marriage would in no way affect her

love and affection for the minor son nor there is any grievance from her son. In this context, he placed reliance on a decision of the Supreme Court

in Lekha v. P. Anil Kumar reported in 2007 (2) MLJ 298 (SC).

30. Placing reliance on a catena of decisions, Learned Senior Counsel further submitted that the Petitioner, who has refused to pay maintenance to

the minor son, has no statutory or legal right to seek for guardianship and hence, prayed for dismissal of the appeal.

Heard the learned Counsel for the parties and perused the materials available on record.

31. Before adverting to the facts of this case, it is necessary to have a cursory look at the provisions dealing with the appointment of guardian to a

minor, under the Guardian and Wards Act and Hindu Minority and Guardianship Act. Section 7 of the Guardian and Wards Act deals with the

power of the Court to make an order, as to guardianship and it reads as follows:

7. Power of the Court to make order as to guardianship:-

(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made-

(a) appointing a guardian of his person or property, or both, or

(b) declaring a person to be such a guardian, the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or

declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing

or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have

ceased under the provisions of this Act.

32. Section 6 of the Hindu Minority and Guardianship Act deals with natural guardians of a Hindu Minor and it reads as follows:

6. Natural guardians of a Hindu Minor.-The natural guardians of a Hindu minor, in respect of the minor''s person as well as in respect of the

minor''s property (excluding his or her undivided interest in joint family property), are-

(a) in the case of a boy or an unmarried girl--the father, and after him, the mother; provided that the custody of a minor who has not completed the

age of five years shall ordinarily be with the mother;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl-- the mother, and after her, the father.

(c) in the case of a married girl-- the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section-

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

Explanation.--In this section, the expressions ""father"" and ""mother"" do not include a step-father and a step-mother.

33. On the pleadings, some of the issues that come up for considerations are,

(1) Whether the Petitioner-father, who has made scurrilous allegations against the Respondent-mother of the child, if proved, would disentitle the

custody and guardianship of the mother and not proved in the manner known to law, is unsuited in a claim for custody and guardianship, because

of his conduct, in making such wild allegations, for the sole purpose of obtaining custody and guardianship of the child?

(2) Whether the economic soundness of the inter-se parties to provide health, education and other facilities, for the betterment of the child is the

sole factor in deciding guardianship?

(3) Whether re-marriage of the father or mother of the child, would disentitle him or her, from claiming custody and guardianship of the child?

(4) Whether the father, being the natural guardian under law, is entitled to have preference over the mother, in the matter of guardianship or the

paramount welfare of the child, is the only factor to be considered?

(5) Whether the conduct and character of the person, claiming guardianship have to be considered, while dealing with the question of custody and

guardianship and when there is some defect in the personal character of the mother or father, as the case may be or if he or she is otherwise

desirable to have the custody and guardianship?

(6) Whether the finding regarding cruelty and suspicion of parentage of the child, rendered in a proceeding inter se between the parties, can be

considered, in a latter proceeding instituted for guardianship?

(7) Whether the mother, who has instituted a maintenance claim for herself and the child, is disentitled from claiming custody and guardianship of

the child, on the ground that she has no means to provide food, shelter and clothing etc., to the child?

(8) Whether in a proceedings for custody and guardianship, the desire of a matured child to live with the mother or father, as the case may be, can

be considered and what is the role of the Court?

(9) Whether the conduct of the father of the child, who has failed to discharge his moral and legal obligations to provide maintenance to his wife

and child all along, till he makes his claim for custody and guardianship, is bona fide and disentitled to claim for custody and guardianship?

34. The answer to the queries framed, lies in the decisions dealt with hereunder.

35. In Samuel Stephen Richard Vs. Stella Richard, , the High Court in deciding the question of custody held as follows:

In deciding the question of custody, the welfare of the minor is the paramount consideration and the fact that the father is the natural guardian

would not ''ipso facto'' entitle him to custody. The principal considerations or tests which have been laid down u/s 17, in order to secure this

welfare are equally applicable in considering the welfare of the minor u/s 25.

The application of these tests casts an ''arduous'' duty on the court. Amongst the many and multifarious duties that a Judge in Chambers performs

by far the most onerous duties are those cast upon him by the Guardians and Wards Act. He should place himself in the position of a wise father

and be not tired of the worries which may be occasioned to him in selecting a guardian best fitted to assure the welfare of a minor and thereafter

guide and control the guardian to ensure the welfare of the ward-a no mean task but the highest fulfillment of the dharmasastra of his own country.

It is only an extreme case where a mother may not have the interest of her child most dear to her. Since it is the mother who would have the

interest of the minor most at heart, the tender years of a child needing the care, protection and guidance of the most interested person, the mother

has come to be preferred to others.

36. In L. Chanaraj Vs. T. Rajammal, , marriage between the parties was solemnized on 1701.1977 and out of the wedlock, a male child was born

on 08.11.1977. The Guardian O.P., came to be filed in the year 1986. Even before that date, the wife had filed a petition in O.P. No. 4 of 1986,

for maintenance. There was neither a plea nor evidence before the Court as to what the father had done to his child for all the years, between 1977

and 1986, i.e., from the year, the child was born and the year of institution of guardian O.P. This Court, after analyzing the entire records to find

out, what steps the father had taken towards the welfare of the ward, held a follows:

As a father, and the natural guardian, he has his own responsibilities towards his children and every father is expected to take care of their child. In

this case, there is absolutely no evidence at all as to what the father has done for his child in the field of education; getting him the necessary

clothes; providing him with all other minimum comforts which a child requires and expects from his father, from the year 1977 to 1986. There is no

evidence at all in this case to show that the father had spent even a single pie on his child, and the evidence of the mothers that the child''s welfare in

the field of education and personal needs are completely taken care of by her with the help of her father. Therefore, I am of the firm opinion that in

this case, the father has not shown to have done anything for his son towards his welfare and that being so, he will not be allowed to come all of a

sudden and ask for the custody of the child. The evidence available in this case establishes beyond doubt that the mother had completely taken

care of the child without any help at all from her husband, namely the father. Therefore, the welfare of the ward, on the facts and circumstances of

this case clearly disentitles the father from asking for the custody of the ward. No doubt, the Lower Court proceeded on the basis that the

Petitioner, having come forward with the allegation that the wife is leading an immoral life and he having failed to prove the allegation, he is not

entitled to the custody. This will be yet another circumstance to show how reckless a father could be in making such wild allegations. If really, he

was serious about those allegations, which would normally disentitles the mother to have the custody he should have proved it. But he had not

chosen to get into the box and substantiate the same. Under these circumstances, I find no merits in the appeal and it is accordingly dismissed.

(emphasis supplied)

37. In Mohd. Ayub Khan Vs. Saira Begum, , the marriage was solemnized between the parties on 17.05.1990 and they were blessed with three

sons. Unable to maintain herself and the children, the wife filed an application u/s 125 of the Code of Criminal Procedure in the year 1997. At that

time, the minor children were aged 7 years, 5 years and 3 years respectively. On the objection of the husband, interim maintenance was rejected.

Thereafter, he filed an application u/s 25 of the Guardian and Wards Act for custody of his elder son, who was aged 7 years. During the pendency

of the maintenance proceedings, he did even pay a pie for the maintenance of his three children. He contended that his wife was not looking after

his children properly and the upkeep and maintenance of the child was not possible at the maternal grandfather"s place and therefore, the

betterment and education of the children and therefore, he should be given the custody of his elder son. On this plea, with reference to the evidence

on record, at Paragraphs 5 and 6 of the judgment, the Court has observed as follows:

5. It is worth noting that the petition was filed on 11-11-1998 but the Appellant did not show his bona fides by providing some help, assistance or

even the alms to his own blood and flesh. On one side he was contesting the litigation u/s 125 Cr.PC and was opposing the petition of his own

children by saying that they are not entitled to any maintenance but at the same time projecting himself to be a kindly and God fearing father, he

was asserting that he is entitled to the custody of Adil Khan so that his future is taken care of.

6. I am unable to understand that how a person who is refusing to pay the maintenance to his own child can come before the Court and say that he

is interested in the betterment of the very same child. On one side he refused to pay the maintenance but at the same time he says that if the

custody is given to him then he would look after the future and career of the said child. The bona fides are not to be seen from what is said but are

to be seen what is done. In the present matter, the present Appellant has hopelessly failed in proving his bona fides. A simple assertion on the part

of the Appellant that he is interested in the upkeep and betterment and future of the child or the statement of his second wife that she would look

after the child properly as her own son would not suffice but something further was to be brought on record. The Appellant was required to satisfy

the judicial conscience of the Court that in fact he is interested in the betterment of the child. No law can be woven without a moral fiber. If the

moral fiber is missing from the law then the law would become ruthless and barbaric. The provisions u/s 125 Cr.PC are woven of moral fiber.

They require a person -a person who has sufficient means -to maintain his or her dependants. No religion says that a person who is obliged to

maintain his dependants should shirk the liability simply because they are living separately. No religion says that the law should not be woven of

moral fiber. The morality requires from a father that he would look after the child. Even he is duty bound to ensure the maintenance and upkeep of

the child. The Shariyat does not say that a father would be entitled to the custody of the child and divorced mother/divorced wife would work as a

slave, after the divorce for a period of seven years, would look after the child, maintain him, keep him alive so that one fine morning the divorced

husband breaks open the doors and takes the custody of that child. It is unfortunate that even after exhibiting such a conduct the present Appellant

has come to the Court and says that he is entitled to the custody of the minor.

38. As regards reckless allegations, in Mary Sumathi, No. 128/5 Emerald Flats, Anna Nagar West, Chennai-40 Vs. Charles Asirvatham No.36

Anna Street, Taramani Chennai-113, , mother filed a petition for custody of the minor child. She was a Doctor and the child was with her for nine

years. It was the contention of the mother that even the paternity of the child was disputed at one point of time and the marriage between them was

also dissolved. Father of the child made reckless allegation, while objecting to the custody of the child. In the above background, this Court, while

answering a question as to whether the appointment of the mother as the guardian would be in furtherance of the welfare of the minor child and

having regard to the conduct and assertion of the Respondent therein that he had not fathered the child and that it was born to the mother with

another person, at paragraph 6, held that when the husband has made such wild allegations, disowning the parentage of the child, such type of

person, not only wants to impress upon the court with recently developed love and affection from the child, which obviously must be only a

pretense.

39. Further, in the above reported judgment, at Paragraphs 10 and 11, while declaring the law that insofar as the appointment of guardian is

concerned, the Court further held that the rights of the parties are only secondary to the paramount consideration and welfare of the minor and held

as follows:

10. Now it is well settled proposition in law that so far as appointment of guardian is concerned the rights of the parties are only secondary and it is

not a question of vindication of right of the husband or wife but the paramount consideration must be only the interest and welfare of the minor, on

the basis of which alone the court can chose the guardian whether it is mother or father. It cannot be also stated father has got a preferential claim

than the mother. After all both are equal partners and therefore it cannot be stated that father has got a better claim to be the guardian or given

custody of the minor child than the mother. Interest and welfare of the minor child consists in providing necessities and comforts which would

ensure that the child grows up in proper atmosphere so that in course of time the child will stand on her own leg and will be an useful addition to

the society and the family. Provision of basis necessities and comforts are only one of the aspects that has to be taken into consideration while

choosing the guardian to be appointed.....

11. Besides, meeting the basic needs, the child must be brought up in proper atmosphere and the conditions in the house must be conducive to her

ever growing personality. Nothing can be said in this capacity. The averments made by the Respondent against the Petitioner are made in a

reckless manner. No importance can be attached to the allegations made by the Respondent against the Petitioner. Since it has been proved that

the Respondent is in the habit of making reckless allegations against the Petitioner..... Under such circumstances, it will be cruel to snatch the

child from the mother, namely the Petitioner with whom the girl has been very much attached and with whom she has been living for the past nine

years. The girl has been brought to the court and even though she is a small girl to be asked to give her option or to choose intelligently it is

apparent that she is deeply attached to her mother and she is very comfortable in the company of her mother and grand parents.

40. In the above reported judgment, on the question as to whether visitation rights should be given to such a person, who did not show any interest

towards the welfare of the child and testing the claim that at each and every stage, to wreck vengeance on her and with a view to snatch away the

child, the father had made reckless allegations, the Court even declined visitation rights to him, holding that a person, who has not even taken any

interest for the welfare of the minor, further observed that if he is granted visitation rights, the child also would be made a victim in the fight between

the mother and father. The Court, on facts of the case, recorded that the Respondent therein would likely to poison the mind of the minor and

would not hesitate to turn her, against her own mother.

41. In Om Prakash Bharuka Vs. Smt. Shakuntala Modi, , father filed an application for custody and guardianship. During the pendency of the

dispute, the court directed the Registrar (Judicial) to submit a report, as to how the children had been looked after by their mother. Two reports

were submitted, stating that the children loved their maternal aunts and they had not been ill-treated by them at any time and the allegation of

torture etc, were not true. Earlier, children were produced and interviewed by the Trial Judge. Prayer for custody of the child was rejected. Being

aggrieved by the same, father preferred an appeal before the High Court. During pendency of the appeal, the father filed yet another application

seeking custody of the children, alleging that mother was leading a immoral life and it would not be in the interest of the children to live with her.

Plea of immoral life by the Respondent was not specifically taken by the husband in the petition, (like in the instant case before this Court). While

considering the paramount interest of the child and the inter se rights of the parents, the Gauhati High Court, at Paragraphs 15 to 17, held as

follows:

15. In considering the question of the welfare of the minors due regard has of course to be paid to the right of the father to be the guardian and also

to all other relevant factors having a bearing on the minor''s welfare. The presumption is that a minor''s parents would do their very best to promote

their children''s welfare and, if necessary, would not grudge any sacrifice of their own personal interest and pleasure. This presumption arises

because of the natural, selfless affection normally expected from the parents for their children.

16. Where there is no dichotomy between the fitness of the father to be entrusted, with the custody of his minor children and considerations of their

welfare, the father''s fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context

of all the relevant circumstances. If the custody of the father cannot promote their welfare equally or better than the custody of the mother, then, he

cannot claim indefeasible right to their custody u/s 25 merely because there is no defect in his personal character and he has attachment for his

children, which every normal parent has.

17. Merely because the father loves his children and is not shown to be otherwise undesirable cannot necessarily lead to the conclusion that the

welfare of the children would be better promoted by granting their custody to him as against the wife who may also be equally affectionate towards

her children and otherwise equally free from blemish, and, who, in addition because of her profession and financial resources, may be in a position

to guarantee better health, education and maintenance for them. Thus therefore, the Court in case of a dispute between the father and mother is

expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents

over them. In short, while giving custody of the children, the welfare of the children should be regarded as a paramount consideration.

42. From the above judgment, it could be seen if there is no defect in the personal character or if he is not shown to be otherwise, undesirable, he

may have an edge over the mother, in claiming custody and guardianship of the minor children, in view of the stationary provision.

But ultimately, it is the paramount welfare of the minor child, which has to be considered by the Court, taking into consideration, various fact Ors.

43. In the reported judgment, regarding the views expressed by the children, the High Court observed that the children without any hesitation have

flatly refused to go and stay with the father. Having regard to the paramount interest of the children and the views expressed by them that they

were comfortable and happy with the mother, the Court declined to grant interim custody to the father.

44. As regards ill-treatment and cruelty, in Mohd. Yunus Vs. Smt. Shamshad Bano, , the spouses were separated and a decree of divorce was

also granted. Father of two children sought for custody on the ground that the children were not getting proper education and it was necessary, in

their interest, that custody be given to him. The application was contested by the mother, inter alia that she was ill-treated, beaten up and turned

out of her husband''s home. She further contended that the two children were receiving the best education and being very well looked after by her.

The Court below dismissed the petition on the ground that for the welfare of the children, it is necessary that they be left with the mother. While

doing so, the Court below also ascertained the wishes of the Appellant''s son, who stated that he would prefer to remain with the mother.

Aggrieved by the same, father filed an appeal. One of the grounds raised in the appeal was that, ""the Court while deciding the question of

guardianship of a minor must, as far as possible, do so consistently with the personal law to which the minor is subject"". On the facts of the case,

yet another issue, which came to be considered, was whether the conduct of the Appellant-husband, in ill-treating his wife, can be considered by

the Court, to arrive at a conclusion regarding the custody and guardianship. The conclusion of the facts, regarding ill-treatment, physical cruelty,

reached by the Court below was not challenged. In this factual background, the Allahabad High Court, at Paragraphs 9 to 11, held as follows:

The plea of the Respondent that she was ill-treated by the Appellant, beaten up and turned out from her husband''s home by the Appellant is fully

substantiated by the evidence on record which has been discussed by the court below at length. I entirely agree with the conclusion reached by the

trial court on this controversy. The allegation of the Appellant that his wife had left on her own on the pretext of attending some marriage in her

family seems entirely unworthy of reliance and has rightly been rejected by the court below. This conduct of the Appellant leads me to the

conclusion that he would not be the right person to whom the custody of the children might be appropriately entrusted. Secondly, from the

evidence on record it is apparent that while in the family of the Respondent there are two female members who could look after the children both

of whom are of tender age, in the Appellant''s family there is only one female member, i.e. the aged mother of the Appellant who, having regard to

her advancing years, would be hardly able to take proper care of the children. The court below, therefore, has rightly taken into consideration this

circumstance in rejecting the Appellant''s petition and allowing the children to remain with the mother. Lastly, I find that the Appellant''s son himself

has expressed a desire before the court below when he was produced after the conclusion of the arguments that he would prefer to stay with his

mother and that he would not like to live with the father. The Appellant''s son at the time of making of the said statement before the court below

was more than 11 years old and was hence, in my opinion, old enough to form an intelligent preference.

10..... It may be mentioned here that the learned Counsel for the Appellant did not challenge the correctness of the various conclusions of fact

reached by the court below. The only contention raised by him was that the court below having found that the Appellant has the requisite means to

educate his children, it should have directed the return of the custody of the children to the Appellant.....

11..... The mere fact that the Appellant is in a financial position to undertake the education of his son, is not decisive of the issue whether it would

be in the best interest of the son to leave him in the custody of the Appellant. In my opinion, having regard to the circumstances in which the

Appellant''s wife was turned out by the Appellant and to the fact that the son had himself expressed preference in favor of the mother and has

expressed a positive reluctance to go to the father and to the other facts and circumstances referred to in the judgment under appeal the court

below has rightly rejected the petition of the Appellant.

45. In Keshav R. Thakur and Anr. v. Suchhibai 2005 9 S.C.C. 424, at paragraph 5, it is observed as follows:

5.... As the grandparents have by reason of interim order or otherwise remained in care and control of the minor Appellant 2 for his entire life, it

will not be appropriate to grant custody of the child to the mother at this stage. Appellant 1, however, will allow the mother to meet the child

whenever the Respondent approaches them for the purpose.

46. In Sheila B. Das Vs. P.R. Sugasree, , it is held as follows:

There is no reason to consider the Respondent ineligible to look after the minor. In fact, after having obtained custody of the minor child the

Respondent does not appear to have neglected the minor or to look after all her needs. The child appears to be happy in the Respondent''s

company and has also been doing consistently well in school. The Respondent appears to be financially stable and is also not disqualified in any

way from being the guardian of the minor child. No allegation, other than his purported apathy towards the minor, has been leveled against the

Respondent by the Appellant. Such an allegation is not borne out from the materials and is not sufficient to make the Respondent ineligible to act as

the guardian of the minor. In the cases cited by the Appellant, the father on account of specific considerations was not considered to be suitable to

act as the guardian of the minor. The said decisions were rendered by the courts keeping in view the fact that the paramount consideration in such

cases was the interest and well being of the minor. The interest of the minor in this case will be best served if she remains with the Respondent

father but with sufficient access to the Appellant to visit the minor at frequent intervals but so as not to disturb and disrupt her normal studies and

other activities. Accordingly, the appeal is dismissed of by retaining the order passed by the Family Court with certain modifications.

47. In Sharli Sunitha Vs. D. Balson, , this Court, held that, ""While economic condition of a claimant to the custody is an important factor, no less

important a factor is: which of the rival claimants to the custody show greater concern for the welfare of the child? Neither economic affluence nor

a deep mental or emotional concern for the well-being of the child, by itself, is determinative of, where the welfare of the child lies. When the

mother is not interested in the welfare of the minor child, she is not entitled to have custody of the minor child, who will be better placed in the

custody of the father.

48. As regards remarriage, in Vellaichamy Nadar v. Jayashree reported in 1998 (3) LW 236, father-in-law and mother-in-law of the Respondent

filed a petition, seeking appointment, as guardian of two children and for a direction to the Respondents to hand over the custody. One of the

reasons, seeking guardianship was that mother of the children got re-married and therefore, she cannot be the legal guardian for the minors.

Dealing with the above aspect, as to whether, re-marriage would disentitle guardianship to the children, this Court, at Paragraphs 4 and 5 held as

follows:

In the absence of any material before the Court, to come to the conclusion that the Respondent had not bestowed any interest in the welfare of the

minors, she will continue to be the legal guardian of the minors. Perhaps the only grievance of the Appellants against the Respondent is her second

marriage. The Respondent will be aged about 20to 27 years, since the minors are aged about 7 and 4 years old. When she lost her husband in the

prime youth of her life, it may be very difficult for her to pull on her life all alone having two minor children.

Merely by remarriage, it cannot be said that the mother would lose the love and affection for her children through the first husband. The evidence

of P. Ws.1 and 2 do not disclose any incidents to show that the Respondent is not bestowing any interest in the welfare of the minor children.

49. In Kumar V. Jahgirdar Vs. Chethana Ramatheertha, , while considering a plea whether re-marriage of the mother was detrimental to the

welfare of the child, at Paragraph 11, the Supreme Court observed that,

The High Court has taken into consideration all other relevant facts and circumstances to come to the conclusion that a female child of growing age

needs company more of her mother compared to the father and remarriage of the mother is not a disqualification for it.

50. In T. Kochappi Vs. R. Sadasivam Pillai, , grand father of the minor child filed an application under the Guardian and Wards Act, claiming

guardianship, on the ground inter alia that the father of the child, after the death of his wife, got re-married. While considering the question as to

whether mere re-marriage would dis entitle a person from guardianship, at Paragraph 8, this Court held as follows:

The fact that the Respondent had married for the second time, will not absolve the right to ask for the custody of the children or for appointing him

as the guardian of the children. The learned Additional District Judge in his order has categorically stated that except the averment that the

Respondent had married for the second time, there is nothing in the affidavit to draw an inference of the Respondent that he had acted against the

interest of the minors warranting removal of the Respondent his guardianship.

51. In Lekha v. P. Anil Kumar reported in 2007(2) MLJ 298 (SC), the marriage between the parties was solemnized on 31.01.1994, as per

Hindu religious rites and customs. Out of the said wedlock, a son was born. After marriage, they lived together for 2 months and thereafter, they

lived separately, because of misunderstanding between them. Wife filed a petition for divorce on the ground of harassment and cruelty. The

husband filed a petition for restitution of conjugal rights. Thereafter, he filed an Original Petition under the Guardians and Wards Act, for the

custody of the 11 year old minor child, contending inter alia that he was financially better than the mother and that he would give better education

to the minor child. In the meantime, the learned Subordinate Judge passed an ex-parte decree for divorce, in favor of the mother and that the

petition for restitution of conjugal rights filed by the husband was dismissed for default. After considering the oral evidence adduced by the parties

and examining the child, the trial Court came to the conclusion that for the welfare of the child, the custody should be given to the mother and

dismissed the Original Petition of the father filed under Guardians and Wards Act. The correctness of the said order was challenged by way of an

appeal before the High Court. The contention of the husband was that contrary to the deposition made by the mother before the trial Court that

she would not re-marry, immediately after the judgment of the petition filed under the Guardians and Wards Act, she got remarried and therefore,

the continued custody of the child with the mother would be detrimental to the interest, progress and welfare of the child. The High Court, without

giving an opportunity to the child to express his willingness, allowed the appeal solely on the ground of remarriage of the mother. On her appeal,

the Supreme Court held that,

13. We are of the opinion that the remarriage of the mother cannot be taken as a ground for not granting the custody of the child to the mother.

The paramount consideration should be given to the welfare of the child. As already noticed, at the interview, the boy has expressed his willingness

and desire to live only with his mother and was admitted by him that the mother will provide him good education. The mother is also drawing

pension of Rs. 6,000/-p.m. and also having land and properties in her name. When the boy says he prefers to live with his mother, we are of the

view that it will be beneficial for the boy and his education for a better future. The High Court, in our opinion, erred in allowing the appeal on the

ground of remarriage of the Appellant without considering the other aspects of the matter. It is a matter of custody of the child and the paramount

consideration should be the welfare of the child. It is not in dispute the boy is living with his mother for the last several years and the separation at

this stage will affect the mental condition and the education of the child and considering that the child himself attaches importance to his education if

the custody is to be given to the father will now affect his academic brilliance and future.

14. The High Court, in our opinion, ought to have seen that the re-marriage cannot be taken as a ground for giving custody of the child. There is

also no finding by the High Court that the remarriage has adversely affected the mental condition of the minor child.

18. The law permits a person to have the custody of his minor child. The father ought to be the guardian of the person and property of the minor

under ordinary circumstances. The fact that the mother has married again after the divorce of her first husband is no ground for depriving the

mother of her parental right of custody. In cases like the present one, the mother may have shortcomings but that does not imply that she is not

deserving of the solace and custody of her child. If the Court forms the impression that the mother is a normal and independent young woman and

shows no indication of imbalance of mind in her, then in the end the custody of the minor child should not be refused to her or else we would be

really assenting to the proposition that a second marriage involving a mother per se will operate adversely to a claim of a mother for the custody of

her minor child. We are fortified in this view by the authority of the Madras High Court in S. Soora Reddi Vs. S. Chenna Reddi and Others, ,

where Govinda Menon and Basheer Ahmed Syed, JJ. have clearly laid down that the father ought to be a guardian of the person and property of

the minor under ordinary circumstances and that fact a Hindu father has married a second wife is no ground whatever for depriving him of his

parental right of custody.

19. A man in his social capacity may be reckless or eccentric in certain respects and other may even develop a considerable distaste for his

company with some justification but all that is a far cry from unfitness to have the natural solace of the company of ones own children or for the

duty of bringing them up in proper manner. Needless to say the Respondent-husband, in this case, seems to be anxious to have the minor child

with him as early as possible in order to look after him properly and to provide for his future education. The feelings being what they are between

the Respondent and the Appellant we think it is also natural on the part of the husband to feel that if the minor child continues to live with his former

wife, it may be brought up to hate the father or to have a very adverse impression about him. This certainly is not desirable. Needless to say, this

Court is not called upon to find that the Respondent-husband has been entirely blameless in his conduct and few occasions referred to in this case

and by the boy at the time of interview, it is not the duty of this Court even to ascertain whether the Respondent is of responsible and good citizen

and a preferred individual. Many people have shortcomings but that does not imply that they are not deserving of the solace and custody of their

children.

52. In J. Selvan v. N. Punidha reported in 2007 (4) MLJ 967, this Court has held that,

It is by now well Settled that in all such matters, the interest and welfare of the minor children are of paramount importance, rather than the

conflicting claims and interests of the parents. The right of the parents is not what is to be decided in these applications, but the right of the children

to have a healthy environment and a physical, emotional and financial support for the development of their integrated personality, that is to be

decided in these applications. [Para 12]

The American Academy of Child and Adolescent Psychiatry has published a summary of the Practice Parameters for Child Custody Evaluation.

The summary was developed by the Work Group on quality issues. It is seen from the abstract to the summary, that it was presented as a guide

for clinicians evaluating the issues surrounding a child custody dispute. The study identified the issues that are common to all child custody disputes

as ""continuity and quality of attachments, preference, parental alienation, special needs of children, education, gender issues, sibling relationships,

parents'' physical and mental health, parents'' work schedules, parents'' finances, styles of parenting and discipline, conflict resolution, social

support systems, cultural and ethnic issues, ethics and values and religion. [Para 13]

Though the prevailing legal test is that of the ""best interests of the child"" test, the Courts have also postulated the least detrimental alternative"" as an

alternative judicial presumption. [Para 14] The issues that have arisen for consideration in this petition, have to be decided on the basis of the ability

and willingness on the part of either of the parties to provide to the minor children, a healthy environment, good parental care and guidance and a

physical, emotional and financial support for the development of their integrated personality. [Para 15]

53. In Nil Rantan Kundu v. Abhijit Kundu reported in 2008 (4) CTC 425, while explaining the scope and power to make orders as to

guardianship and the factors to be considered by the Courts in the matter of appointment of mother as guardian, this Court, at Paragraphs 56, 59,

61, 62, 72 and 74, held as follows:

56. In our judgment, the law relating to custody of a child is fairly well-settled and it is this. In deciding a difficult and complex question as to

custody of minor, a Court of law should keep in mind relevant statutes and the rights flowing there from. But such cases cannot be decided solely

by interpreting legal provisions. It is a humane problem and is required to be solved with human touch. A Court while dealing with custody cases, is

neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount

consideration should be the welfare and well-being of the child. In selecting a guardian, the Court is exercising parens patriae jurisdiction and is

expected, nay bound, to give due weight to a child''s ordinary comfort, contentment, health, education, intellectual development and favorable

surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more

important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the Court must

consider such preference as well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor.

59. We are unable to appreciate the approach of the Courts below. This Court in catena of decisions has held that the controlling consideration

governing the custody of children is the welfare of children and not the right of their parents.

61. It was also observed that the father''s fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor

children in the context of all the relevant circumstances. The father''s fitness cannot override considerations of the welfare of the minor children.

62. In our opinion, in such cases, it is not the `negative test'' that the father is not `unfit'' or disqualified to have custody of his son/daughter is

relevant but the `positive test'' that such custody would be in the welfare of the minor which is material and it is on that basis that the Court should

exercise the power to grant or refuse custody of minor in favor of father, mother or any other guardian.

72. In our considered opinion, on the facts and in the circumstances of the case, both the Courts were duty bound to consider the allegations

against the Respondent herein and pendency of criminal case for an offence punishable u/s 498A, IPC. One of the matters which is required to be

considered by a Court of law is the `character'' of the proposed guardian. In Kirit Kumar, this Court, almost in similar circumstances where the

father was facing the charge u/s 498A IPC, did not grant custody of two minor children to the father and allowed them to remain with maternal

uncle. Thus, a complaint against father alleging and attributing death of mother and a case u/s 498A, IPC is indeed a relevant factor and a Court of

law must address to the said circumstance while deciding the custody of the minor in favour of such person. To us, it is no answer to state that in

case the father is convicted, it is open to maternal grand parents to make an appropriate application for change of custody. Even at this stage, the

said fact ought to have been considered and appropriate order ought to have been passed.

73. As already noted, Antariksh was aged six years when the trial Court decided the matter. He was, however, not called by the Court with a

view to ascertain his wishes as to with whom he wanted to stay. The reason given by the trial Court was that none of the parties asked for such

examination by the Court.

74. our considered opinion, the Court was not right. Apart from statutory provision in the form of Sub-section (3) of Section 17 of 1890 Act, such

examination also helps the Court in performing onerous duty, in exercising discretionary jurisdiction and in deciding delicate issue of custody of a

tender-aged child. Moreover, the final decision rests with the Court which is bound to consider all questions and to make an appropriate order

keeping in view the welfare of the child. Normally, therefore, in custody cases, wishes of the minor should be ascertained by the Court before

deciding as to whom custody should be given.

54. In Mausami Moitra Ganguli Vs. Jayant Ganguli, , the Appellant mother was living separately on account of cruelty of the Respondent father

and got an ex parte decree of divorce which attained finality. Though the Family Court gave the custody to the Appellant-mother, the High Court in

appeal, by the impugned order set aside the order of the Family Court and granted permanent custody of the child to the Respondent father and

only visitation rights were given to the mother. On appeal, at Paragraphs 19 to 23 and 26, the Apex Court held as follows:

19. The principles of law in relation to the custody of a minor child are well settled. It is trite that while determining the question as to which parent

the care and control of a child should be committed, the first and the paramount consideration is the welfare and interest of the child and not the

rights of the parents under a statute. Indubitably the provisions of law pertaining to the custody of a child contained in either the Guardians and

Wards Act, 1890 (Section 17) or the Hindu Minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child as a

predominant consideration. In fact, no statute, on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor.

20. The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances. Each case has

to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are

concerned. It is, no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the

working member and head of the family, yet in each case the Court has to see primarily to the welfare of the child in determining the question of his

or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be

the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the Court to exercise its judicial discretion judiciously

in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration.

21. In Rosy Jacob Vs. Jacob A. Chakramakkal, , a three-Judge Bench of this Court in a rather curt language had observed that the children are

not mere chattels; nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in

the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal

balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to

strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.

22. In Halsbury''s Laws of England (Fourth Edition, Vol.13), the law pertaining to the custody and maintenance of children has been succinctly

stated in the following terms:

809. Principles as to custody and upbringing of minors. Where in any proceedings before any court, the custody or upbringing of a minor is in

question, the court, in deciding that question, must regard the welfare of the minor as the first and paramount consideration, and must not take into

consideration whether from any other point of view the claim of the father in respect of such custody or upbringing is superior to that of the mother,

or the claim of the mother is superior to that of the father. In relation to the custody or upbringing of a minor, a mother has the same rights and

authority as the law allows to a father, and the rights and authority of mother and father are equal and are exercisable by either without the other.

23. Having bestowed our anxious consideration to the material on record and the observations made by the courts below, we are of the view that

in the present case there is no ground to upset the judgment and order of the High Court. There is nothing on record to suggest that the welfare of

the child is in any way in peril in the hands of the father. In our opinion, the stability and security of the child is also an essential ingredient for a full

development of child''s talent and personality. As noted above, the Appellant is a teacher, now employed in a school at Panipat, where she had

shifted from Chandigarh some time back. Earlier she was teaching in some school at Calcutta. Admittedly, she is living all alone. Except for a very

short duration when he was with the Appellant, Master Satyajeet has been living and studying in Allahabad in a good school and stated to have his

small group of friends there. At Panipat, it would be an entirely new environment for him as compared to Allahabad.

26. Under these circumstances and bearing in mind the paramount consideration of the welfare of the child, we are convinced that child''s interest

and welfare will be best served if he continues to be in the custody of the father. In our opinion, for the present, it is not desirable to disturb the

custody of Master Satyajeet and, therefore, the order of the High Court giving his exclusive custody to the father with visitation rights to the mother

deserves to be maintained. We feel that the visitation rights given to the Appellant by the High Court, as noted above, also do not require any

modification. We, therefore, affirm the order and the afore-extracted directions given by the High Court. It will, however, be open to the parties to

move this Court for modification of this order or for seeking any direction regarding the custody and well-being of the child, if there is any change

in the circumstances.

55. In Gaurav Nagpal Vs. Sumedha Nagpal, , wife filed an application u/s 6 of the Hindu Minority and Guardianship Act, 1956 along with Section

25 of the Guardian and Wards Act, 1890. The said application was allowed by the District Judge. The appeal before the High Court was

dismissed. The stand of the Appellant before the High Court was that there was no finding by the Court below that he had suffered from any

disability in his role as a father and, therefore, there was no comprehensive reason for the Court to direct custody of the child to be entrusted to the

Respondent therein. It was also contended that the mere fact that the Respondent therein was the mother, cannot be the sole basis for allowing the

petition. With reference to Section 6 of the Act, it was pleaded that the father was the legal guardian and the welfare of the minor child lies with the

Appellant therein. He also pleaded that he was financially sound with good income and reside in a joint family, where the interest of the child can

be taken care of in all respects. On the aspect of financial support, it was contended that with the meagre income, she would not be in a position to

provide good education to the child.

56. Per contra, it was contended that the child''s welfare cannot be weighed in terms of money, facilities, area of the house or the financial might of

either, the father or the mother. It was further contended that merely because she was residing with the parents, that would not disqualify her from

looking after her child. It was also contended that though she may not be as financially sound like that of the Appellant and mere economic status

alone would not disentitle her from claiming custody of the child.

57. In the background of above pleadings, after considering the statutory provisions and the inter-se rights of the parties and most important

parameter, the paramount welfare of the child, the Supreme Court, held that on the facts of the case, the High Court was right in confirming the

decision, entrusting the custody of the child to the mother. While doing so, the Supreme Court considered the law relating to the custody in various

countries, which are worth reproduction.

English Law

29. In Halsbury''s Laws of England, Fourth Edition, Vol. 24, para 511 at page 217 it has been stated:

Where in any proceedings before any court the custody or upbringing of a minor is in question, then, in deciding that question, the court must

regard the minor''s welfare as the first and paramount consideration, and may not take into consideration whether from any other point of view the

father''s claim in respect of that custody or upbringing is superior to that of the mother, or the mother''s claim is superior to that of the father.

(emphasis supplied)

It has also been stated that if the minor is of any age to exercise a choice, the court will take his wishes into consideration. (para 534; page 229).

30. Sometimes, a writ of habeas corpus is sought for custody of a minor child. In such cases also, the paramount consideration which is required to

be kept in view by a writ-Court is `welfare of the child''.

31. In Habeas Corpus, Vol. I, page 581, Bailey states:

The reputation of the father may be as stainless as crystal; he may not be afflicted with the slightest mental, moral or physical disqualifications from

superintending the general welfare of the infant; the mother may have been separated from him without the shadow of a pretence of justification;

and yet the interests of the child may imperatively demand the denial of the father"s right and its continuance with the mother. The tender age and

precarious state of its health make the vigilance of the mother indispensable to its proper care; for, not doubting that paternal anxiety would seek

for and obtain the best substitute which could be procured yet every instinct of humanity unerringly proclaims that no substitute can supply the

place of her whose watchfulness over the sleeping cradle, or waking moments of her offspring, is prompted by deeper and holier feeling than the

most liberal allowance of nurses" wages could possibly stimulate.

It is further observed that an incidental aspect, which has a bearing on the question, may also be adverted to. In determining whether it will be for

the best interests of a child to grant its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment.

32. In Mc Grath, Re (1893) 1 Ch 143: 62 LJ Ch 208, Lindley, L.J. Observed:

The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of the child is not to be measured by money only

nor merely physical comfort. The word `welfare" must be taken in its widest sense. The moral or religious welfare of the child must be considered

as well as its physical well-being. Nor can the tie of affection be disregarded.

(emphasis supplied)

American Law

33. Law in the United States is also not different. In American Jurisprudence, Second Edition, Vol. 39; para 31; page 34, it is stated:

As a rule, in the selection of a guardian of a minor, the best interest of the child is the paramount consideration, to which even the rights of parents

must sometimes yield.

(emphasis supplied)

In para 148; pp.280-81; it is stated:

Generally, where the writ of habeas corpus is prosecuted for the purpose of determining the right to custody of a child, the controversy does not

involve the question of personal freedom, because an infant is presumed to be in the custody of someone until it attains its majority. The Court, in

passing on the writ in a child custody case, deals with a matter of an equitable nature, it is not bound by any mere legal right of parent or guardian,

but is to give his or her claim to the custody of the child due weight as a claim founded on human nature and generally equitable and just.

Therefore, these cases are decided, not on the legal right of the Petitioner to be relieved from unlawful imprisonment or detention, as in the case of

an adult, but on the Court''s view of the best interests of those whose welfare requires that they be in custody of one person or another; and hence,

a court is not bound to deliver a child into the custody of any claimant or of any person, but should, in the exercise of a sound discretion, after

careful consideration of the facts, leave it in such custody as its welfare at the time appears to require. In short, the child''s welfare is the supreme

consideration, irrespective of the rights and wrongs of its contending parents, although the natural rights of the parents are entitled to consideration.

An application by a parent, through the medium of a habeas corpus proceeding, for custody of a child is addressed to the discretion of the court,

and custody may be withheld from the parent where it is made clearly to appear that by reason of unfitness for the trust or of other sufficient causes

the permanent interests of the child would be sacrificed by a change of custody. In determining whether it will be for the best interest of a child to

award its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment.

(emphasis supplied)

34. In Howarth v. Northcott 152 Conn 460: 208 A 2nd 540: 17 ALR 3rd 758; it was stated:

In habeas corpus proceedings to determine child custody, the jurisdiction exercised by the Court rests in such cases on its inherent equitable

powers and exerts the force of the State, as parens patriae, for the protection of its infant ward, and the very nature and scope of the inquiry and

the result sought to be accomplished call for the exercise of the jurisdiction of a court of equity.

It was further observed:

The employment of the forms of habeas corpus in a child custody case is not for the purpose of testing the legality of a confinement or restraint as

contemplated by the ancient common law writ, or by statute, but the primary purpose is to furnish a means by which the court, in the exercise of its

judicial discretion, may determine what is best for the welfare of the child, and the decision is reached by a consideration of the equities involved in

the welfare of the child, against which the legal rights of no one, including the parents, are allowed to militate.

(emphasis supplied)

It was also indicated that ordinarily, the basis for issuance of a writ of habeas corpus is an illegal detention; but in the case of such a writ sued out

for the detention of a child, the law is concerned not so much with the illegality of the detention as with the welfare of the child.

45. In Saraswatibai Shripad Ved Vs. Shripad Vasanji Ved, ; the High Court of Bombay stated:

It is not the welfare of the father, nor the welfare of the mother that is the paramount consideration for the Court. It is the welfare of the minor and

the minor alone which is the paramount consideration.

(emphasis supplied)

46. In Rosy Jacob Vs. Jacob A. Chakramakkal, , this Court held that object and purpose of 1890 Act is not merely physical custody of the minor

but due protection of the rights of ward"s health, maintenance and education. The power and duty of the Court under the Act is the welfare of

minor. In considering the question of welfare of minor, due regard has of course to be given to the right of the father as natural guardian but if the

custody of the father cannot promote the welfare of the children, he may be refused such guardianship.

47. Again, in Thrity Hoshie Dolikuka Vs. Hoshiam Shavaksha Dolikuka, , this Court reiterated that the only consideration of the Court in deciding

the question of custody of minor should be the welfare and interest of the minor. And it is the special duty and responsibility of the Court. Mature

thinking is indeed necessary in such situation to decide what will enure to the benefit and welfare of the child.

41. In Surinder Kaur Sandhu (Smt.) v. Harbax Singh Sandhu: 1984 3 SCR 422, this Court held that Section 6 of the Act constitutes father as a

natural guardian of a minor son. But that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the

minor. [See also Elizabeth Dinshaw (Mrs.) v. Arvand M. Dinshaw (1987) 1 SCC 42; Chandrakala Menon (Mrs) and Another Vs. Vipin Menon

(Capt.) and Another, .

58. After considering the principles followed in the matter of adjudication of custody or guardianship, the Supreme Court, at Paragraph 48, held as

follows:

48. Merely because there is no defect in his personal care and his attachment for his children--which every normal parent has, he would not be

granted custody. Simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the

conclusion that the welfare of the children would be better promoted by granting their custody to him. Children are not mere chattels nor are they

toys for their parents. Absolute right of parents over the destinies and the lives of their children, in the modern changed social conditions must yield

to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society

and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the

requirements of welfare of the minor children and the rights of their respective parents over them.

59. On the duties and responsibilities of the Courts in deciding custody and guardianship, the Apex Court, at Paragraphs 50 and 51, further held

that,

50. When the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The Court has not only to

look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The court then does not give emphasis on

what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mousami Moitra Ganguli''s

case (supra), the Court has to due weight age to the child''s ordinary contentment, health, education, intellectual development and favorable

surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than

the others.

51. The word `welfare'' used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical

welfare of the child must also weigh with the Court as well as its physical well being. Though the provisions of the special statutes which govern the

rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens

patriae jurisdiction arising in such cases.

60. In M.J. Janarthanan Vs. K.A. Nagayasamy and Nageswaran, , a petition for guardianship was filed for the minor children. The Respondents

were father-in-law and brother-in-law. There was difference of opinion between the spouses and when the wife was at the advanced stage of

pregnancy, she went to her parent''s house and thereafter, did not return to the matrimonial home. Husband filed a petition for conjugal rights and

they lived together and a 2nd female child was born. Subsequently, she died. After the funeral rights were performed, father of the children

demanded the custody of the children, which was not given to him and the children were taken away by the Respondents therein. In the application

for guardianship, it was averred that the father-in-law was a retired government servant and was getting only a meagre amount by way of pension,

wherein, the father of the children was earning a good salary. It was further averred that as per Section 6 of the Hindu Minority and Guardianship

Act, the Petitioner therein (father) and natural guardian of the children, was entitled to have the custody of the minor children.

61. The above said averments were disputed and it was contended on behalf of the in-laws, with whom, the children were living, that prior to

death of his wife, Petitioner therein (father) treated his wife cruelly and it would not be conducive for the children to go with the father. On

evaluation of evidence, the Lower Court found that the wife was ill-treated by the Petitioner therein and by their in-laws, prior to her death and the

welfare of the children was taken care of by the grand father and accordingly, the lower Court dismissed the application for guardianship. When

the correctness of the decision was tested before this Court, the Hon''ble Mr. Justice K. Chandru, after considering a catena of decisions, held

that,

16. .....it is not necessary to disturb the present arrangement where the children are being educated by their grandfather and there is also no

complaint from the children. Therefore, the petition for custody of the two children cannot be allowed to be given to the Petitioner.

62. As regards the desire of a child to live with the father or mother, as the case may be, in N. Nirmala v. Nelson Jeyakumar 1998 (3) M.L.J.

619, in paragraphs 28 and 31, it is laid down as follows:

28. It is settled in law that normally due to immaturity, in the sense, not able to form an independent decision or opinion, the preference of the

minor should not control the Court as a decisive fact in deciding the custody of a minor. But, where the child who has been away from the mother

for a long period, should not be forced to go back, against the inclination of the minor, as it may have an adverse effect on the mind of the minor.

Therefore, under what circumstance the preference of the minor to be taken into consideration always depends upon the facts and circumstances

of each case.

31. So far as the intelligent preference of a minor is concerned, it is always better to bear in mind the age and also the capability of the minor

forming an intelligent preference. That is why, the selection of guardian by such an infant is according to the statutory provisions, subject to the rule

of the Court. The Court may disapprove the selection made by the minor when, in its Judgment, the person selected is not the proper person to be

the guardian. But, ordinarily, it is the duty of the Court to appoint the person so selected, if he is competent and suitable although the Court may be

of the opinion that some other person would fill the position better. Unless the court is satisfied that the choice of the minor is detrimental to her

interest or contrary to law, she should be permitted to exercise her right.

63. In Bhupinder Singh Vs. Smt. Kanchan Rani, wife filed a petition under Sections 11 and 13(1)(ia) of the Hindu Marriage Act for declaration

that her marriage with the husband as null and void or in the alternative, to grant a decree of divorce, on the ground of cruelty. The learned District

Judge held that no legal marriage was solemnized between the parties. Thereafter, wife moved a petition u/s 25 of the Act, for restoration of the

minor daughter to her. The husband resisted the claim petition, controverting the allegations. The petition was allowed and the custody of the child

was given to the mother.

64. Being aggrieved by the same, husband preferred an appeal. During the pendency of the proceedings, the desire of the minor child was

ascertained. According to the minor, she was living with her father for last 10 years, along with her grand mother, father''s sister and other

members of the family. She expressed her desire to continue to life with her father. Mother, in spite of the notice being served on her, did not

appear before the High Court nor instructed the amicus curiae appointed by the Court. Taking into consideration the totality of the case and the

fact that the minor was living happily with the father and grandmother, getting proper education, the Division Bench of Himachal Pradesh High

Court allowed the appeal.

65. In R. Kasthuri Vs. R. Raveendran, , in paragraphs 10 and 11, it is observed as follows:

10. It is axiomatic that the welfare of the child is of paramount consideration. The way in which the boy answered the questions shows that he is an

intelligent boy and he knows his preference. He has been living with his mother for the past 12 years and his educational needs have been taken

care of by his mother. There is absolutely no evidence of ill-treatment by her, but on the other hand, the boy''s statement shows that his care has

been taken very well by his mother and her relatives. His statement also shows that he is doing well in the class and if the boy is uprooted now and

placed in the custody of the father, we are of the view that that will unsettle his educational career and his future prospects also.

11. Though both the parents are affectionate to the child, it is clear that the child has been brought up by the mother all along from the childhood.

We are of the view that if the child is taken away from the custody of the mother, it would affect his personal and educational career and we

therefore hold that the custody of the child should continue to be with the mother.

66. In V. Maria Puspha Janet Rajam v. Anatha Jeyakumar reported in 2003 (3) CTC 677, after considering the views of the wishes of the

children, who were summoned to the chambers and a catena of judgments and having regard to the state of mind of the children, permitted the

maternal grand father to keep the custody of the children and on the facts of this case, permitted the father of the children to have the visitation

rights.

67. In R.G. Bhuwanesh Vs. G. Usha Rani, , the Lower Court which adjudged the question of guardianship, enquired the children, in his chambers

and ascertained their wishes, who had emphatically stated that they wanted to live with their mother and they also expressed their willingness and

confirmation in the company of the mother. The Lower Court, after ascertaining the status, progress of the children, etc., arrived at the conclusion

that the children were looked after by the mother very well. When the above said decision was challenged, a Division Bench of this Court held that

the desire of the minor children can be taken into account, while deciding the guardianship and custody. Facts of the reported case is squarely

applicable to the present case, for the reason that when the minor child, for whom, the guardianship was sought for, was examined by this Court,

he has categorically expressed his willingness and confirmation in the company of his mother, viz., the Respondent herein.

68. In an unreported judgment made in C.M.A. No. 2224 of 2002, dated 30.08.2006, [D. Vilvanathan v. G. Rajendran and another], a learned

Single Judge of this Court, while considering the prayer for appointment of Guardianship, with reference to the statutory provisions under Sections

17 and 25 of the Guardians and Wards Act, at Paragraph 11, this Court, held as follows:

11. A reading of Sections 17 and 25 of the Guardians and Wards Act 1890 (hereinafter referred to as ""the Act"") clearly shows that while

appointing or declaring the guardian of a minor, the Court has to consider the welfare of the minor. While considering the question of welfare of the

minor, the Court has to take note of the age, sex and religion of the minor, the character and capacity of the proposed guardian and his relationship

to the minor, the wishes, if any, of a deceased parent. Further if the minor is old enough to form an intelligent preference to understand what is

happening in and around him/her that may also be considered in preference to other conditions. While appointing a guardian, the paramount

consideration is that his/her appointment shall not be against the will of the minor. In the light of the above said principles, the rival contentions have

to be considered.

69. Reverting back to the case on hand, when the Respondent sought for maintenance for herself and minor son, the Petitioner has seriously

opposed the petition on the ground that they were not entitled to the same and thereby, failed to discharge his moral and legal obligation to provide

maintenance, which includes, food, shelter, clothing etc. In such circumstances, M.C. No. 57 of 2003, has been allowed on 23.12.2004, directing

him to pay maintenance.

70. Pleadings disclose that when the order was sought to be enforced, the Petitioner has filed Crl.R.C. No. 908 of 2005 and in spite of a

conditional order made on 06.12.2005, he was not willing to make any payment, depsite the matter being referred to Lok Adalat for settlement

and consequently, on merits, this Court, by order, dated 09.11.200.., has dismissed the Civil Revision Petition, upholding the order of maintenance

given to the minor son. Being aggrieved by the dismissal, the Petitioner has preferred a SLP before the Supreme Court.

71. Thus, as rightly contended by Mr. R. Shanmugasundaram, Learned Senior Counsel for the Respondent, it is evident that right from 1994

onwards, the Petitioner has not made any payment towards maintenance of his wife and minor child and failed to discharge his moral and legal

obligations, in providing even the basic needs, like, food, shelter, education, etc., to the minor son and all of a sudden, after nearly fourteen years,

has come out with an application under the Guardian and Wards Act, in the year 2008, for custody and guardianship of the minor son. If the

averments of the Petitioner that he was affectionate and always willing to provide the basic requirements to the minor child, were to be true, he

should have readily accepted to pay, at least the maintenance awarded to the child, to show his bona fides, that he has considered the paramount

welfare of the child. Pleadings and material on record disclose that when the Petitioner has failed to provide maintenance to the wife and son for so

many years, during the pendency of maintenance petition, divorce proceedings and even after the disposal, now all of a sudden, after so many

years, in the petition for guardianship, has contended that he would be the best person to provide education, health and other basic needs to the

child. The conduct of the Petitioner does not reflect his bona fides.

72. Father, who fails to discharge his moral and legal obligations under law to provide even the basic needs to the child, in spite of demand,

whatever be the difference between the spouses and who has vehemently opposed the maintenance grant, tooth and nail, up to Apex Court, has

no moral conscience to contend that he was always ready and willing to provide all the best that the child required. In the opinion of this Court,

such a person is dis-entitled to seek for custody and guardianship of the child, for the simple reason that the moral fibre is totally absent in his

conduct.

73. Whether the Petitioner was really interested in the welfare of the child from 1994 till 2008, till he filed the Guardianship O.P., it is also relevant

to consider the conduct of the Petitioner. Though he has inter alia contended that he has made several attempts to see the child in the Respondent''s

house and also in the School and that his efforts were thwarted, as rightly contended by the Learned Senior Counsel for the Respondent that if the

Petitioner-father was really interested in seeing the child, nothing prevented him from filing an application seeking for guardianship, even during the

pendency of the maintenance claim petition or taking out an application for interim custody, pending litigation inter-se between parties. There is

absolutely no reason, as to why he has not chosen to do, so all along, even though remedy was available. He has not even taken out any

application, claiming visitation rights, during the pendency of divorce proceedings or Guardianship Petition and therefore, the contention that he has

due regard for the welfare of the child, is far from truth, not supported by any iota of evidence and cannot be accepted.

74. Though the proceedings for maintenance was instituted, way back in 2001 and that there was litigation, pending between the parties, for nearly

seven years, he has not shown any interest towards the welfare of the child and after confirmation of the orders in the revision petition, directing

maintenance to the minor son, and mother, the Petitioner in order to defeat their legitimate claim, has chosen to file this petition for guardianship.

75. In Mohr. Ayub Khan''s case, the Court has considered the bona fide of the husband that on the one hand, he was contesting the proceedings

u/s 125 Cr.P.C., opposing that the wife and children, were not entitled to maintenance and on the other hand, in the Guardian O.P., he had

contended that if custody was given to him, he would look after the career of the child. Inasmuch as there is similarity of facts, the judgment in

Mohd. Ayub Khan''s case, is squarely applicable to the case on hand.

76. Merely because the father is the natural guardian, he is not entitled to have priority over the mother of the child in the matter of custody and

guardianship. Paramount welfare of the child alone is the consideration and the Court has to consider all the factors, including, the economic status,

character of the person, claiming custody and guardianship, love and affection shown by the parties towards the betterment of the child, the age of

the child, etc.

77. At this juncture, it is to be noted that one of the grounds for granting divorce in O.P. No. 152 of 2002, on the file of the Family Court is mental

cruelty, doubting the paternity of the child. The said finding has not been challenged by the Petitioner. The finding rendered by the lower Court in

an earlier proceeding, making frivolous allegations against the Respondent-wife, cannot simply be brushed aside by this Court, as the conduct and

character of the rival contenders would certainly affect the mental frame of the child and they play a vital role, as good parental care depends upon

physical, emotional and financial support, for the development of integrated personality of the child.

78. Going through the materials on record, this Court is of the view that the averments made in the petition for custody and guardianship, certainly

are not from the bottom of his heart, but from his lips. One who has shunned the child, owing to his color and even doubted the parentage and

failed to provide maintenance for so many years, has come forward to plead that the injury which he has caused to the wife should simply be

ignored by this Court. It is really hard to digest his submissions. Love and affection, care and comfort for the minor child, pleaded after so many

years are not natural.

79. On the facts of the case, this Court is of the considered view that the conduct of the Petitioner in treating the Respondent cruelly, by even

doubting the parentage of the child, at the time of adjudicating the divorce proceedings, inter-se, is absolutely a relevant factor, to be considered,

for the purpose of assessing the character of the person, who seeks custody and guardianship of the child. If the Petitioner has doubted even the

parentage of the child, how can he expected to extend true love and affection to the child? In Mary Sumathi"s case, on similar facts, this Court has

observed that the father of the child, who made reckless allegations, disowning the parentage of the child, had only wanted to impress upon the

Court with recently developed love and affection for the child and that the Court has observed that it was only a pretence. The judgment squarely

applies to the facts of this case.

80. Therefore, this Court is of the view that the findings rendered in earlier proceedings, inter-se between the parties, on the aspect of love and

affection, failure to provide maintenance, care and comfort to the minor and the wild allegations, regarding the parentage of the child and the wife

leading an immoral life, are all relevant and to be taken into consideration, in a proceeding for custody and guardianship of the child, as conduct

and character of the person, claiming guardianship are relevant factors to be taken into consideration.

81. Though the Petitioner has made a grievance over the observation of the lower Court that the Petitioner, who had doubted the chastity of this

wife and paternity of the child, as not entitled to custody and guardianship and based on a xerox copy of a document, not marked before the

Lower Court, made allegations that the Respondent has suppressed an earlier marriage and therefore, contended that she is not entitled to

guardianship and custody of the minor child, this Court is not inclined to accept the said submission, based on the above said document, which is

not admissible in evidence.

82. The further contention of the Petitioner that in the absence of any specific denial in the counter affidavit filed by the Respondent, touching upon

the aspect of suppression of earlier marriage and therefore, it amounts to implicit admission of her conduct, cannot be countenanced. It is also well

settled that mere averment does not stand the test of proof. In District Basic Education Officer and Another Vs. Dhananjai Kumar Shukla and

Another, , the Respondent was appointed as Headmaster in a recognized School, but it was contrary to the rules, governing appointment of the

said post. As he was not paid salary, he filed a Writ Petition before the Allahabad High Court. An interim order was passed, directing the

education department to continue him in the said post and to pay salary. On appeal, the interim order was vacated. However, since no counter

affidavit was filed in the Writ Petition, the same was allowed. Application for re-calling the said order was also dismissed. On appeal, the Division

Bench confirmed the same, stating that the principles of Order 8 Rule 5 of CPC., would apply and that the averments made in the Writ Petition,

would be deemed to have been admitted. The correctness of the views expressed by the Division Bench, was challenged on appeal before the

Supreme Court. At Paragraph 12 to 14, the Supreme Court held that,

12. We would proceed on the basis that the High Court might have been justified in proceeding ex-parte but then it should have kept in mind the

principles underlying Order 8 Rule 5 of the CPC, (assuming that the provisions of the Code of CPC are applicable in terms of the High Court rules

framed by the High Court of Allahabad despite Section 141 of the CPC), that not only despite non-filing of the written statement a Court of law

may call upon the Plaintiff to prove his case but also there cannot be any doubt whatsoever, that no relief can be granted by the High Court in

exercise of its jurisdiction under Article 226 of the Constitution of India which would be contrary to law.

13. As basic foundational fact stands admitted before us, we are of the opinion that the judgment of the High Court cannot be sustained. The

appointment of Respondent No. 1 being contrary to the mandatory provisions as contained in Rule 6 of the Rules, the same was a nullity. An

appointment which was per se illegal could not have been directed to be legalized only because the Appellant did not file its counter affidavit. It did

not admit the Respondent''s claim. The question involved in the writ petition was a legal question. As indicated hereinbefore, the foundational facts

are undisputed.

14. Rules of pleading contained in the Code of CPC do not cover questions of law. If a fact stands admitted the same in terms of Section 56 of the

Indian Evidence Act need not be proved. Only because such a question was not allegedly raised before the High Court, this Court could not shut

its eyes to the legal position.

In the light of the decision stated supra, the contention of the Petitioner that there was an implicit admission by the Respondent regarding previous

marriage is rejected.

83. Paramount welfare of the child depends on many factors, such as, means to bring up the child, socio economic condition and it also includes

the conduct and character of the person, claiming guardianship, who has to raise the child, till he or she attains majority. The Court has to take into

consideration all relevant factors that are required for deciding the custody and guardianship. Just because, one of the contenders is affluent than

the other, but does not possess moral standards, which is expected of, custody and guardianship of the child cannot simply be entrusted ignoring

the paramount welfare of the child. To illustrate, a person, who is a drunkard or leads an immoral life, but is affluent and can provide all that the

child requires, cannot, as a matter of right, under the provisions of Guardian and Wards Act, be entrusted with the custody of the child on the

ground that he is financially sound or claim any preferential right, just because, he is the father and natural guardian..

84. As regards the contention that when the Respondent is even dependent on her parents and claimed even maintenance from him and therefore,

not entitled for custody and guardianship of the child, as she would not be in a position to provide the best education to the child and other needs,

this Court is of the considered view that merely because, the wife makes a claim for maintenance, that would not disentitle a mother to make a

claim for custody and guardianship, considering the paramount welfare of the child. Certainly, financial resource is one of the factors to be

considered, in the interest of the child, but it is not the only criteria in determining the custody and guardianship of the child. If that is the only

criteria, then every husband, who abandons his wife and child and fails to discharge his moral and legal obligations, would come forward and stake

his claim for custody and guardianship, on the sole ground that his wife and mother of the child is dependent on him for maintenance, and therefore,

should be entrusted with the custody and guardianship.

85. on record shows that the Respondent has admitted her child in a convent at Ooty. Though it is contended by the learned Counsel for the

Petitioner that the child is a hostler and therefore, the Respondent has not extended her love and affection, it is not uncommon that many students

are studying in hostels and Boarding Schools and that cannot be a reason to contend that the mother has no love and affection towards the child.

86. Pleadings disclose that in order to improve the performance of the child in sports activities, the Respondent has shifted him from one school to

another and that itself would show the love and affection of the mother, in developing the child"s interest in the field, in which, he has shown

excellence. It is now well settled that the Court can consider the views of the minors also in deciding the custody and guardianship. Record of

proceedings shows that in the instant case, the child has been enquired and that he has expressed happiness and desire to be with the Respondent-

mother. Though the Respondent got remarried in the year 2006, there is absolutely no complaint from the child that re-marriage has affected his

mental condition or education. The child has been living with the Respondent for so many years and uprooting the custody and separating the child

from the mother at this length of time, would certainly affect the education and mental condition of the child.

87. In view of the above discussion, this Court considered is of the view that the lower Court has considered the paramount welfare of the child, in

all respects and accordingly, found that the custody and guardianship should be retained with the mother of the child. There is no manifest illegality.

The Civil Miscellaneous Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petitions are also closed.